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No. 85-1637

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BUDGET RENT A CAR OF CINCINNATI, INC. - - - - - - - - - - Appellant

versus

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - Appellee

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MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of Kentucky

ROSS T. CARTER
Legal Services Section
Revenue Cabinet
P. O. Box 423
Frankfort, Kentucky 40602
Ph: 502/564-3112
Counsel for Appellee

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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No. 85-1637

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BUDGET RENT A CAR OF CINCINNATI, INC. - *Appellant*

v.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - - *Appellee*

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Kentucky on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I. THE STATE LAWS INVOLVED AND THE NATURE OF THE CASE.

The Greater Cincinnati Airport is located in Northern Kentucky. Budget Rent A Car of Cincinnati maintains an outlet there, renting automobiles to customers who frequently drive across the Ohio River into Cincinnati. Some of the cars which Budget rents were licensed in Kentucky, and some were licensed in Ohio. The question of where the vehicles should have been

registered is not an issue in this case. The questions raised by Budget were: may Budget rent its Ohio-licensed vehicles from its Kentucky outlet without paying tax to Kentucky?; and, is tax due on every Kentucky transaction even though some of the vehicles are driven some of the time in Ohio?

The first question was decided purely under state law. Kentucky imposes a usage tax for the privilege of using Kentucky highways. The Supreme Court of Kentucky looked at the applicable statutes and regulations (Ky. Rev. St. 138.460, 138.463, 138.455, and 103 Ky. Admin. Reg. 44:020) and determined that Kentucky motor vehicle usage tax was due on every transaction that took place in Kentucky, irrespective of whether the vehicle bore Ohio or Kentucky license plates. This question, since it involves only state law, is presumably not before this Court for consideration.

II. THE FEDERAL QUESTION INVOLVED.

The second question was decided by the Kentucky Supreme Court under the commerce clause of the federal constitution. The Court applied the classic four-part test set out in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), and concluded that taxation of all of Budget's Kentucky operations imposed no unconstitutional burden on interstate commerce.

Other constitutional arguments, such as a denial of equal protection, were not raised by Budget and have never been discussed in the proceedings below.

III. A BRIEF SUMMARY OF THE KENTUCKY SUPREME COURT'S DECISION.

A. The State Law Issue.

In Kentucky, vehicle rental agencies may select between two methods of paying motor vehicle usage tax. They may pay either five percent of the value of the vehicle at the time it is registered in Kentucky, or they may pay five percent of the gross rental charges derived from renting the vehicle in Kentucky. Budget argued that since registration in Kentucky is a prerequisite to the first alternative, it must also be a prerequisite to the second alternative. The Supreme Court of Kentucky ruled to the contrary. The Court simply stated that if the second alternative is elected, then usage tax is due on all rentals executed within Kentucky, regardless of where the vehicle may have been registered. To hold otherwise would permit Budget to escape tax completely simply by purchasing Ohio license plates for all the vehicles located at the Kentucky outlet. In fact, there was some evidence in the record to indicate that this had indeed occurred.

B. The Federal Constitutional Issue.

The basic tenor of the constitutional argument below was that since interstate commerce is implicated (by virtue of the fact that some customers drive rental vehicles from Kentucky into Ohio and back) then the entire transaction, or a large proportion of the total transactions, must be exempt from taxation. In applying the *Brady, supra,* test the Kentucky Supreme Court

reached these conclusions: the Kentucky motor vehicle usage tax does not discriminate against interstate commerce; maintaining a business outlet for the rental of vehicles in Kentucky supplies sufficient nexus to impose the tax; it is not necessary that the tax be apportioned on the basis of mileage, under the authority of *Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 (1950); and the tax is fairly related to the services provided by the state, viz., the privilege of using Kentucky highways.

IV. ARGUMENT.

A. The Case Presents No Substantial Question Not Previously Decided by This Court.

Complete Auto Transit, supra, supplies the definitive test for determining whether Kentucky's tax is valid under the commerce clause. The appellant does not propose that *Complete Auto Transit* ought to be extended, discarded, or substantially modified. Rather Budget seems to argue either that *Complete Auto Transit* should not be applied at all (see Appellant's jurisdictional statement, pp. 14-15) or that the Kentucky Supreme Court mishandled the apportionment prong of the *Complete Auto Transit* test. (See Appellant's jurisdictional statement, pp. 15-16).

First, it should be clear that *Complete Auto Transit* applies to highway tax cases. The case itself, after all, dealt with a tax levied on a motor carrier. Subsequent cases discussing *Complete Auto Transit* have indicated that it applies to all types of interstate commerce, including use of highways. See *Massachusetts v. United*

States, 435 U. S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978).

Second, this Court has ruled that a state may ignore mileage completely in evaluating the apportionment prong of the *Complete Auto Transit* test. In *Capitol Greyhound Lines v. Brice, supra,* the Court stated: "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. [. . .] We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage . . . ." 339 U. S. at 546-547, 94 L. Ed. 2d 1053, 70 S. Ct. 806.

Complete Auto Transit and *Capitol Greyhound Lines* specifically hold that the fact that a taxpayer may travel extensively on out-of-state highways does not invalidate a tax or reduce a tax on his in-state travels. This case illuminates the precise reason for that rule. Paying the Kentucky tax entitles Budget and Budget's customers to use every highway in Kentucky. As it happens they choose to use our highways very little; but they are free, just like every other Kentucky taxpayer, to use every mile of Kentucky's highways. Their privilege is the same as everyone else's; therefore their tax obligation should be the same, too.

B. Budget Attempts to Raise Issues Which Were Not Raised Before and for Which It Lacks Standing.

Budget elected to be taxed under the second alternative. Budget now argues that the *first* alternative is invalid. Budget paints a picture of ravenous tax col-

lectors stationed at the state's borders extracting an onerous tax from every non-resident who desires to drive into our state. That scenario might be appropriate if Budget were one of those hypothetical non-residents who was stopped and forced to pay the tax. But those are not the facts of this case. The pertinent fact here is that Budget rents automobiles in Kentucky to people who sometimes drive into Ohio, and doesn't want to pay tax to either state. Budget should not be permitted to avoid its own tax obligation by arguing that another tax, assessed against another taxpayer, might be unconstitutional.

V. CONCLUSION.

For the reasons stated herein this appeal should either be dismissed or affirmed.

Respectfully submitted,

ROSS T. CARTER
Legal Services Section
Revenue Cabinet
P. O. Box 423
Frankfort, Kentucky 40602
Ph: 502/564-3112

Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or Affirm were served this ____ day of May, 1986, in compliance with the Rules of the Supreme Court of the United States, by depositing three copies in a United States post office or mailbox, with first-class postage prepaid, addressed to Hon. Robert S. Miller, Miller, Griffin & Marks, P.S.C., Suite 700, Security Trust Building, Lexington, Kentucky 40507-1293. All parties required to be served have been served.

Ross T. Carter
Attorney for Appellee

APPENDIX

RENDERED: JANUARY 16, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 84-SC-991-DG

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - - - - - *Movant*

v.

BUDGET RENT-A-CAR OF CINCINNATI, INC. - - - - - - - - - *Respondent*

On Review From the Court of Appeals
No. 84-CA-707-MR
(Franklin Circuit Court No. 82-CI-1017)

OPINION OF THE COURT BY JUSTICE GANT REVERSING AND REMANDING

Budget Rent-A-Car of Cincinnati, Inc., among its operations, maintains an automobile rental outlet at Greater Cincinnati Airport, which is located in Boone County, Kentucky. Rentals at that site comprise some 60% of the total business of the corporation. Pursuant to the applicable statutes and regulations of this state, an allocation formula was devised and agreed to by which Budget registered some 19% of the vehicles used at this location in Kentucky, the remainder being registered in Ohio. This action concerns the usage tax payable to the Commonwealth under the applicable law of the state.

The statute pertaining to the question is:

KRS 138.463. Collection of tax on U-Drive-It. — (1) A holder of a certificate as required under KRS 281.615 to operate as a U-Drive-It as defined in KRS 281.014 may pay the usage tax as provided in KRS 138.460 or, subject to the provisions of subsection (2), may pay a usage tax of five per cent (5%) levied upon the amount of the gross rental or lease charges paid by a customer or lessee renting or leasing a motor vehicle from such holder of the certificate.

(2) A holder of a certificate shall pay the usage tax as provided in KRS 138.460 unless he shows to the satisfaction of the Cabinet that he is regularly engaged in the renting or leasing of motor vehicles to retail customers as part of an established business. Persons first engaging in the renting or leasing of motor vehicles to retail customers shall, in addition to obtaining a certificate required under KRS 281.615, demonstrate to the satisfaction of the Cabinet that they are prepared to qualify under the standards set forth in this subsection.

(3) In the event the holder of such certificate qualifies under subsection (2) and elects to pay the usage tax by the alternate method as provided in subsection (1), he shall present his certificate to the county clerk at the time the motor vehicle is offered for registration in Kentucky and the following provisions shall be applicable.

(4) The tax shall be the direct obligation of the holder of the certificate but it may be charged to and collected from the customer in addition to the rental or lease charges. The tax due shall be remitted to the Revenue Cabinet.

The applicable regulation in this case is 103 KAR 44: 020(6)(b):

> Fleets of vehicles operating under a U-Drive-It permit which are registered pursuant to an allocation formula by the Department of Transportation may, upon approval of the Department of Revenue, elect to pay the five per cent (5%) usage tax on revenue derived from rental or leasing of all vehicles rented or leased in Kentucky.

Under KRS 138.463(1), Budget chose to operate under this second option, which provides a usage tax of 5% upon "gross rental or lease charges paid by a customer or lessee," rather than paying the usage tax on the vehicles registered in Kentucky. However, they paid this optional tax only on the rental or lease charges on those vehicles registered in Kentucky, and not on the rental or lease charges for the entire fleet of U-Drive-Its rented at the Kentucky location. Relying upon the above quoted regulation and statute, and after a complete audit of Budget, Revenue assessed a deficiency of $255,526, plus penalties and interest, contending the regulation and the statute clearly required under the option selected by Budget that the 5% usage tax applied to all Kentucky rentals, not merely to rentals of those vehicles registered in the state.

The audit conducted by Revenue on the records of Budget disclosed that Budget had collected the 5% usage tax on all vehicles in the rental fleet, irrespective of its registration, applying the tax to the "time and mileage" charge and the collision insurance charge, but not to other charges such as the "drop-off" charge in the rental contracts. However, Budget had paid the tax thus collected on only the vehicles registered in Kentucky, pocketing the remainder.

The Board of Tax Appeals upheld the deficiency assessment, plus penalty and interest, but its Opinion and Order, written by Edward F. Prichard, Jr., Chairman, was reversed by the Franklin Circuit Court and that reversal was upheld by the Court of Appeals.

STATUTORY CONSTRUCTION

KRS 138.463 provides two alternate methods of paying taxes for U-Drive-It businesses operating in Kentucky. They may pay the usage tax of 5% provided under KRS 138.460 on the value of registered vehicles at the time of registration; or, they may pay a usage tax of 5% on the "gross rental or lease charges paid by a customer or lessee renting or leasing *a* motor vehicle . . ." There is no language of limitation if the company elects to pay its tax under the second alternative and yet the interpretation urged upon us and adopted by Budget (and by the Court of Appeals) would add to the second alternative, after the words "motor vehicle," the phrase "Registered in Kentucky." We cannot concur with such equivocation, and find no connection in the statute between the two alternatives which would make the first alternative an incidence of the second. *Cf. Furste v. Dixie Traction Company,* 286 Ky. 336, 150 S. W. 2d 913 (1941).

The alternative methods are quite simple. Once the allocation formula is determined, as provided by 103 KAR 44:020, the U-Drive-It operator may pay the usage tax provided by KRS 138.460 at the time of registration, on all vehicles registered in Kentucky, and exclude those vehicles registered in another state; or they may elect to pay the 5% usage tax derived from leases entered into in this state on *all* vehicles in the rental fleet which are leased in Kentucky.

To hold otherwise would permit Budget to select the best of both alternatives. For example, the record divulges

that there was annually a vast difference between the percentage of vehicles registered in Kentucky and the percentage of rental of those vehicles when compared to the entire fleet rental. Also, for two periods, one of four months and one of five months, no tax was paid at all inasmuch as no Kentucky vehicle was rented out of the entire fleet. Clearly, the statute was not intended to permit Budget, or similar enterprises, to do business in this state on a regular basis without paying a fair and proper tax for that privilege. *Cf. Reeves v. Deisenroth,* 288 Ky. 724, 157 S. W. 2d 331 (1941). Further, KRS 138.455 states that all taxes imposed under the applicable sections of the chapter are taxes "on the privilege of using a motor vehicle upon the public highways" of this state. Under our Constitution, the revenues from such taxes are mandated to be placed in the road fund.

CONSTITUTIONALITY

The principal thrust of Budget's argument herein is that the regulatory scheme enacted by Revenue under the statute and under the applicable regulations are violative of the United States Constitution, art. 1, § 8, CL. 3, the interstate commerce clause. Budget's contention was adopted by the Franklin Circuit Court and the Court of Appeals, but we do not agree. Although the law relating to the commerce clause has undergone cyclical changes over the past 50 years, one phrase has been repeatedly echoed in the halls of the Supreme Court of the United States. That phrase is: "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823 (1938).

The criteria which are to be applied to any state tax relating to interstate commerce, by whatever name such tax may be levied, were set out in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Those are: (1) There shall not be discrimination between foreign and state corporations; (2) There must be local activities within the taxing state to form sufficient nexus to justify the tax; (3) The tax must be properly apportioned to local activities; and (4) The tax must be related fairly to services provided by the state. Also, this case goes on to say, such tax would be upheld even though the activity was generated exclusively by interstate sales.

Applying these criteria to the case before us, we find distinct compliance with each of them. First, there is no discrimination between this Ohio corporation and any Kentucky corporation operating in the same line of business. In fact, no discrimination is even urged by the respondent. Second, the entire activities of Budget in renting its fleet at its airport location in Kentucky are intrastate, not interstate, giving more than sufficient connection, or nexus, to this state in the operation. The fact that the customer, or lessee, may go north, south, east or west from his point of Kentucky origin is his choice, not that of Budget. Also, in whichever direction he goes, he operates upon the highways of this state for some portion of the trip. This is a total answer to the third standard. The apportionment by mileage urged by Budget is not required under the commerce clause, especially where there is this volume of local activities. *See Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 (1950). Finally, the tax is on the privilege to use the highways in this state, not on the use itself. Although Budget may charge by the *mile* driven, the tax is a flat percentage charge for the *privilege.*

Of course, as Budget readily admits, there is no question of double taxation herein as Ohio charges no registration tax or usage tax on any of the Ohio licensed vehicles in the fleet.

STATUTORY APPLICATION

We further affirm the Board of Tax Appeals in its opinion that the tax applies to *all* charges, including "total time and mileage," "full collision insurance," "personal accident insurance," and "drop-off charges," as set out in the lease agreement with Budget as lessor and the customer as lessee. We find no ambiguity in a statute which assesses the usage tax upon "gross rental" and "gross . . . lease charges." As any dictionary definition reads, "gross" means "without deductions." If it is a charge contained in the lease, by clear meaning that is a "lease charge."

We reverse the Court of Appeals on the issues herein disposed of and remand this case to the Franklin Circuit Court for further proceedings dealing with penalty assessment, statute of limitations, and all other issues originally raised but not disposed of in that court.

All concur.

Attorney for Movant:

ROSS T. CARTER
Legal Services Section
Revenue Cabinet
P. O. Box 423
Frankfort, KY 40602

Attorney for Respondent:

ROBERT S. MILLER
Miller, Griffin & Marks, P.S.C.
700 Security Trust Building
Lexington, KY 40507